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Supreme Court, U.S.
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No. 03-710

IN THE

Supreme Court of the United States

GERALD DEVENPECK, a Washington State Patrol Officer,
JOI HANER, a Washington State Patrol Officer,
and their marital communities,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement Of The Case	1
A. Factual Background	1
B. Procedural History	3
Summary Of The Argument	4
Reasons For Denying The Petition	5
1. This Case Does Not Merit Review Because The Decision Below Applies An Objective Standard For Qualified Immunity That Balances The Rights Of Citizens With Practical Policing.	5
2. Review Is Not Merited Due To The Speculative Possibility That The Officers Held An Erroneous, Subjective Belief As To Qualified Immunity.	10
Conclusion	12

TABLE OF CITED AUTHORITIES

	Page
Cases	
Alford v. Haner, 333 F.3d 972 (9th Cir. 2003)	9
Anderson v. Creighton, 483 U.S. 635 (1987)	5
Avery v. King, 110 F.3d 12 (6th Cir. 1997)	9
Beck v. Ohio, 379 U.S. 89 (1964)	6
Beier v. Lewiston, 354 F.3d 1058 (9th Cir. 2004)	9, 10
Biddle v. Martin, 992 F.2d 673 (7th Cir. 1993)	7
Bingham v. City of Manhattan Beach, 341 F.3d 939 (9th Cir. 2003)	9
Davis v. Scherer, 468 U.S. 183 (1984)	6
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	5, 7, 11
Hope v. Pelzer, 536 U.S. 730 (2002)	11
Parratt v. Taylor, 451 U.S. 527, 535, *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986)	5
Richardson v. Bonds, 860 F.2d 1427 (7th Cir. 1988)	8
Saucier v. Katz, 533 U.S. 194 (2001)	6, 11

Cited Authorities

	Page
Sheehy v. Plymouth, 191 F.3d 15 (1st Cir. 1999)	7, 8, 9
Soldal v. Cook County, Ill., 506 U.S. 56 (1992)	5
Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982)	8
United States v. Rambo, 789 F.2d 1289 (8th Cir. 1986)	9
United States v. Reed, 349 F.3d 457 (7th Cir. 2003)	9
Vance v. Nunnery, 137 F.3d 270 (5th Cir. 1998)	9
Washington v. Flora, 845 P.2d 1355 (Wash. Ct. App. 1992)	2
Whren v. United States, 517 U.S. 806 (1996)	6
Wood v. Strickland, 420 U.S. 308 (1975)	7
United States Constitution	
Fourth Amendment	*passim*
Statutes	
42 U.S.C. § 1983	3, 5
RCW 9.73.030	3

Pursuant to Supreme Court Rule 15, Respondent, Jerome Anthony Alford, submits this Brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Under the Fourth Amendment's protection against unreasonable search and seizure, a constitutional violation occurs if the arresting officer lacked "probable cause" to make the arrest. This means that an arrest is unlawful if, using the objective standard of a reasonable law enforcement officer, the facts did not justify an arrest.

In this case, the law was clearly established that tape-recording one's public interactions with law enforcement was not a violation of the Washington Privacy Act. The officers' later attempts to justify the arrest based on conduct separate, and distinct, from that giving rise to the arrest were rebuffed by the Court of Appeals. Although the officers can be entitled to qualified immunity for using improper legal nomenclature in charging or booking if the underlying conduct was criminal, they are not entitled to rationalize a bad arrest by dredging up any illegal conduct that the plaintiff might have (at some time) committed. This is the rule in the clear majority of Circuits that have considered the issue, and comports with the precedents, and spirit, of qualified immunity.

A. Factual Background

On the evening of November 22, 1997, Tony Alford, an employee at the Puget Sound Naval Shipyard, was on his way to his second job as a bouncer. App. 6a. Noticing a car broken down by the side of the road, he stopped and offered to help. App. 6a. After a few minutes, he left, but only after

helping the young men jack up their car, and giving the stranded motorists a flashlight to use. App. 6a. Immediately after he left, he was followed and stopped by Joi Haner, a Washington State Trooper, for questioning about his "wig wag" headlights. App. 6a-7a.

In order to protect himself from harassment and in order to use as evidence, Mr. Alford was carrying a tape-recorder in his car. App. 7a. When stopped that night, he turned it on. App. 7a.

When questioned about his headlights, Mr. Alford informed the Trooper that a local dealer had just installed a new alarm system that very day, and that he was unsure of how it operated. App. 7a.

Sergeant Devenpeck arrived on the scene, and he and Haner came to the car while Devenpeck interrogated Mr. Alford about his headlights. App. 7a. After several minutes, Devenpeck noticed that Mr. Alford had been tape-recording the traffic stop. App. 7a. He immediately placed Mr. Alford under arrest for "illegal tape recording," stating that he could not record the stop without the officer's consent. App. 7a.

Mr. Alford told the officers that he had been through this before with the Kitsap County Sheriff's Office, and had with him both a copy of the applicable statute and a copy of *Washington v. Flora*, 845 P.2d 1355 (Wash. Ct. App. 1992), a Washington Court of Appeals case holding that the Privacy Act does not protect police officers on the job. App. 7a. The officers would not look at the case. App. 7a.

At the jail, Mr. Alford was charged with a violation of RCW 9.73.030, illegally recording a private conversation without consent. Mr. Alford's car was towed and impounded, and he was forced to spend the night in jail. App. 8a. A District Judge later dismissed both the traffic citation and the charge. App. 8a.

B. Procedural History

On November 12, 1999, Mr. Alford filed an action under 42 U.S.C. § 1983 alleging that the arrest, incarceration and prosecution violated his rights under the Fourth Amendment, as well as for certain state law claims. App. 8a.

On November 30, 2000, a defense Motion for Summary Judgment was granted in part, and denied in part, removing the State Patrol as a Defendant, but allowing the claims against Officers Devenpeck and Haner to proceed, holding that it was clearly established that tape-recording police officers in the public performance of their duties was not criminalized by the Washington Privacy Act. App. 39a.

At trial on January 2-5, 2001, Senior District Judge Robert J. Bryan instructed the jury that the law was clearly established at the time of the incident that Mr. Alford had committed no crime. Despite this, the jury found for the Defendants. App. 27a. A Motion for Judgment as a Matter of Law, or in the alternative, For a New Trial was denied. App. 8a.

The Ninth Circuit Court of Appeals reversed this decision, holding that no reasonable officer could have believed tape-recording the police during public performance

of official duties constituted a "private conversation." App. 15a. A Petition for Rehearing En Banc was denied. App. 32a.

SUMMARY OF THE ARGUMENT

The underlying action was based on the simple premise that public officials in the public performance of their official duties are not protected by the Privacy Act. Since this issue was specifically addressed by the Washington Court of Appeals almost a decade ago, the law was clearly established at the time of this arrest. Additionally, given the state of the law, and the admissions of the Officers at trial, no reasonable officer could have believed that Mr. Alford was violating the law by this public taping.

The Court of Appeals correctly struck a balance between the rights of the public and the practicalities of policing, allowing qualified immunity only where the same conduct for which the person was arrested furnished probable cause to arrest. By doing so, the Ninth Circuit adeptly avoided injecting an impermissible element of subjectivity into the qualified immunity analysis. This was in keeping with the holdings of this Court, as well as a majority of the Circuit Courts of Appeals.

Additionally, a subjective misunderstanding on the part of the officers regarding qualified immunity does not make the law unclear. Rather, this Court's precedent requires that the right be clearly established, and that a standard of objective reasonableness be met.

REASONS FOR DENYING THE PETITION

The Petition should be denied for one central reason – requiring probable cause to exist for a closely related offense is the only way to maintain the standard of objective reasonableness that has served as the cornerstone of qualified immunity analysis.

1. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE DECISION BELOW APPLIES AN OBJECTIVE STANDARD FOR QUALIFIED IMMUNITY THAT BALANCES THE RIGHTS OF CITIZENS WITH PRACTICAL POLICING.

"When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

Liability under 42 U.S.C. § 1983 requires proof of two essential elements: first, the conduct complained of was committed by a person acting under the color of state law; second, that the conduct deprived the person of rights, privileges or immunities secured by the Constitution of laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). A search and seizure that violates the Fourth Amendment is actionable under 42 U.S.C. § 1983. *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992).

The Fourth Amendment provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated. . . ." U.S. Const. amend. IV. The Fourth Amendment prohibits arrests without probable cause. *See Beck v. Ohio*, 379 U.S. 89, 90-91 (1964). Since Mr. Alford was detained, arrested, and then incarcerated there is no question but that he was seized, and the protections of the Fourth Amendment were triggered. *See Saucier v. Katz*, 533 U.S. 194 (2001); *Whren v. United States*, 517 U.S. 806 (1996).

Law enforcement may yet escape liability for an unlawful seizure if their conduct falls within the contour of the judicially-created "qualified immunity" standard. The doctrine of qualified immunity "protects governmental officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Saucier*, *ibid.*

This Court has long rejected forays into the subjective intent of the arresting officer, instead focusing on an objective standard. *Davis v. Scherer*, 468 U.S. 183, 190 (1984) ("Whether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of [his] conduct as measured by reference to clearly established law.")

In the instant case, Petitioners attempt to cloak their actions with objective reasonableness based on their own subjective beliefs as to the legality of their conduct. App. 13a. Additionally, they attempt to mis-cast the prevailing standard of the Ninth Circuit Court of Appeals as a subjective one, when it is clear that the test iterated actually *avoids* a subjective inquiry. Pet. at 15; App. 13a.

As a preliminary, there is no requirement that an officer be given qualified immunity if probable cause does not exist for the crime charged. However, Courts have adopted the "related offense" doctrine to afford immunity when the officer has mislabeled or mischaracterized the unlawfulness of objectively unlawful conduct.

This is doctrinally consistent with this Court's approach to qualified immunity dating back to *Harlow*. Prior to that, qualified immunity was synonymous with "good faith" immunity, and carried both an objective and a subjective component. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975). After observing that this subjective element too-frequently precluded an early decision on qualified immunity, the Court abandoned it, adopting the now-familiar formulation that immunity lies "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

The related offense doctrine is "consistent with the teachings" above, as it precludes allowing an officer to argue about his intentions, or reasons, regarding charging. *Sheehy v. Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999). An officer's "erroneous legal description of the basis for an arrest should not expose the officer to liability if another officer would have concluded that there was probable cause to arrest for a related offense on the basis of the same conduct." *Id.* Limiting the inquiry to the "same conduct" as that which formed the basis for the actual arrest allows the officer to "choose which crime she will charge without having to charge every single offense sustainable on the facts," *Biddle v. Martin*, 992 F.2d 673, 677 (7th Cir. 1993), but prevents the officer from later offering "ex post facto

extrapolations of all crimes that might have been charged. . . ." *Richardson v. Bonds*, 860 F.2d 1427, 1431 (7th Cir. 1988). Such a broadening would "open the door" to endless explanations, rationalizations, and justifications. *Sheehy*, 191 F.3d at 21.

As the Fifth Circuit has pointed out, this inquiry does *not* depend upon a subjective component. By requiring a nexus between the charged offense and the later justification, the Court noted that the "related" requirement "obviates the need for a delicate subjective inquiry, likely to turn on little more than self-serving statements and speculation." *Trejo v. Perez*, 693 F.2d 482, 486 (5th Cir. 1982). Thus, the relevant inquiry is: Could the conduct that served as the basis of the arrest provide probable cause for another charge to a reasonable officer in the same situation? *Id.*

Cases applying this doctrine show its eminent practicality. In *Sheehy v. Plymouth*, 191 F.3d 15 (1st Cir. 1999), the Court addressed an arrest made after a fight between neighbors. *Id.* at 17-18. The officer initially stated that Mr. Sheehy was under arrest for failing to give him name; by the time they reached the precinct, the charge of disorderly conduct and assault with a dangerous weapon. *Id.* at 18. These charges were dismissed. *Id.*

The District Court applied the related offense doctrine, and granted qualified immunity to the officer. *Id.* The Circuit Court agreed that the related crimes doctrine should be the standard, but noted that "the crime with which the arrestee is charged and the crime offered to the court as a justification for the arrest must relate to the same conduct." 191 F.3d at 19-20. Additionally, the two crimes must be "directed generally at prohibiting the same type of conduct." *Id.* The

Court then found that "Sheehy's interaction with Officer Quinn was the sole basis for the arrest," and that Quinn "relied at the police station on prior conduct of Sheehy that unmistakably did not serve as the basis for the challenged arrest." *Id.* at 20-21.

In the Seventh Circuit, probable cause must exist on a "closely-related charge," that is, one that arises from "the same set of facts" that gave rise to the arrest. *United States v. Reed*, 349 F.3d 457, 462-63 (7th Cir. 2003). The Sixth Circuit has adopted this same position in allowing qualified immunity in a case where there was probable cause for a "related offense" that arose from the same conduct. *Avery v. King*, 110 F.3d 12 (6th Cir. 1997).

In the Eighth Circuit, "Where a defendant is arrested for the wrong offense, the arrest is still valid if probable cause existed to arrest the defendant for a closely related offense." *United States v. Rambo*, 789 F.2d 1289, 1294 (8th Cir. 1986). Even in the Fifth Circuit, the "related offense" must arise from the same conduct as the charged offense. *See Vance v. Nunnery*, 137 F.3d 270 (5th Cir. 1998). These formulations are identical to that adopted by the Ninth Circuit in *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003).

Additionally, while Petitioners cite to *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003) (*Bingham II*), as evidence that the Ninth Circuit itself is in conflict, both that case, and subsequent cases within the Circuit, show that the "closely-related offense" doctrine is being applied without problems. *See, e.g., Beier v. Lewiston*, 354 F.3d 1058, 1065-66 (9th Cir. 2004) (denying qualified immunity to officers who improperly applied terms of a domestic violence order).

Applying this Court's precedents, and closely adhering to the policies underlying the doctrine of qualified immunity, the lower court correctly declined to rewrite the doctrine of qualified immunity to allow either an inquiry into the officers' subjective intentions, or an ex-post-facto search for justification for an arrest. Thus, there is no need for this Court to grant review to perform the type of "subjective inquiry" that it has rejected in so many cases. As the Ninth Circuit stated in *Beirs*, "To shift the focus of the inquiry, as the officers would have us do, away from their actual actions to hypothetical decisions they would have faced had they behaved reasonably cannot be reconciled with the policy precepts underlying the qualified immunity doctrine." 354 F.3d at 1071. Based on this, the Court should decline review, or summarily affirm the decision below, as fully in keeping with the standards and principles of this Court's Fourth Amendment jurisprudence.

2. REVIEW IS NOT MERITED DUE TO THE SPECULATIVE POSSIBILITY THAT THE OFFICERS HELD AN ERRONEOUS, SUBJECTIVE BELIEF AS TO QUALIFIED IMMUNITY.

Further, Petitioners improperly conflate the issues of "clearly established right" and qualified immunity. Petitioners' contention may be summarized as follows: If the officers had the subjective belief that they could later justify the arrest based on unrelated conduct, the law was not "clearly established," and qualified immunity lies. Pet. at 21-27. This logic is flawed from inception.

If the contours of the *right* being protected were sufficiently clear, the burden shifts to the officer to show

objective reasonableness. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Here, the officers attempt to argue that if the contours of their *immunity* are not clear, they cannot be held liable. This finds support nowhere in the law. *See generally Hope v. Pelzer*, 536 U.S. 730 (2002) (reiterating standard).

This Court has always recognized that the clearly established law requirement is a component of the qualified immunity analysis, not vice versa. In fact, this Court has observed, "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *see also Saucier*, 533 U.S. at 201. If the court finds that the right was clearly established, the inquiry turns to whether a reasonable officer would have known his conduct violated that right. If this follows, qualified immunity lies. *See generally See Saucier v. Katz*, 533 U.S. 194 (2001).

The analysis adopted by this Court makes it clear that even if the contours of what is essentially an affirmative defense are subject to argument, that does not impact the unlawfulness of the conduct, but merely the ability to find civil liability. If the right was clearly established, the right was violated, and if the conduct does not meet the standard of objective reasonableness, the analysis ends.

Indeed, to adopt the Petitioners' argument would be to inject an impermissible subjective element into the analysis. Once again, Petitioners attempt to put the focus on what they may, or may not, have subjectively believed at the time of the arrest. This does not even approach the objective standard of reasonableness required of them, and certainly does not merit review by this Court.

CONCLUSION

In summary, the Ninth Circuit's decision fully comports with the precedent, and aims, of the qualified immunity doctrine. Any further expansion of the "closely related offense" doctrine would open a Pandora's box of subjectivism and rationalization that would have the potential to eviscerate the protections of the Fourth Amendment. For all the reasons discussed above, the Petition for Certiorari should be denied.

Respectfully submitted,

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